OFFICE OF THE ATTORNEY GENERAL

MEMORANDUM

TO: M. JEROME DIAMOND, Attorney General

FROM: BENSON D. SCOTCH, Deputy Attorney General

DATE: January 22, 1975

SUBJECT: KEDROFF PUBLIC ACCESS BILL

redraft rec. 1/30/75

1) Public agencies are defined in line 17 on page 2 to include any agency, department, branch or authority of the State. The word "department" is omitted from political subdivisions of the State in line 19, but the word "board" is included, where it is omitted in definition of a public agency in line 17. By comparison, 1 V.S.A. §312, the right to attend meetings of public agencies does include "any board" of any State agency. There are State boards that should be subject to the right-to-know law. The definition of covered agencies in lines 17 to 20 would appear to be under-inclusive and would seem to differ from the coverage of 1 V.S.A. §312.

2) There may be some basis for exception 12 at the bottom of page 4. Frankly, I cannot think of any reason why anyone paid by the State should maintain that his or her salary is a confidential matter.

3) Exception 13 on the top of page 5 is so vague as to permit the widest kinds of arguments by elected officeholders concerning nearly every single document in his or her control. The word "or" on line 2 leaves an independent exception for correspondence and communications "concerning formulation of policies relating to his office." This includes nearly everything. Because of the word "or" you need not independently find that such a disclosure would be an invasion of privacy if disclosed. As to records of such an individual, it is hard to deduce from the printed word just what dangers are sought to be avoided here.

4) Section 319 on page 6 of the bill concerning Attorney General's opinions is problematical. Sections (a) and (b) do not prescribe any appeal from the opinion of the Attorney General. Is the Attorney General an agency of the State for purposes of VRCP Rule 75 review? If so, and this is a distinct possibility, the Attorney General would be in the anomalous position of a regulatory agency from whom appeal can be taken. Who would represent the State in such cases? Would the Attorney General have to hire special counsel? Does the Section intend finality with no review whatsoever? It is doubtful that this intent is valid, if no review is indeed intended.

Under Subsection (c), the situation is compounded. There, the Attorney General is a court of appeals for the "lower court" opinions of a state's attorney. It is not in the judicial spirit for two administrative levels of State Government to act in serial appellate fashion. From a point of view of either workload or common sense, it would appear more expeditious to have the Attorney General determine the matter in the first instance. Compounding problems in subsection (c) is the whole question of appeal, raised above.

5) The questions raised in §319 are truly brought to a boil in §320. Putting aside the question of appeal from the determination of the Attorney General, an aggrieved person under §320 can apply to the courts to compel the agency in question to ask the Attorney General's or State's Attorney's opinion. Assuming this relief is granted, the State's Attorney might then issue an opinion which could be appealed to the Attorney General under §319. What then? Arguably under Rule 75, the Attorney General's opinion could be appealed to the very court which compelled the State's Attorney who issued the opinion in the first place. Any court will sense this possible outcome and would probably be inclined to want to answer the legal question in the first instance rather than to defer to the Attorney General acting in his new mantle of quasi-judicial power.

Moreover, §320 provides the remedy of direct injunction in lines 6 and 7, thereby giving a simple option to the aggrieved party which would seem to nullify the complicated paraphernalia we have just described.

BDS/bp